(2)

No. 86-412

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE COPLEY PRESS, INC.,
THE STATE JOURNAL-REGISTER,
JIM TINEN, STEVE SLACK,
JOHN P. CLARKE, EDWARD H. ARMSTRONG,
and PATRICK COBURN, Petitioners,

v.

WILLIAM D. SMITH.

ON WRIT OF CERTIORARI TO THE
FOURTH DISTRICT APPELLATE
COURT OF ILLINOIS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Jeffrey B. Levens
Counsel for Respondent
Sturm & Levens
308 East Canedy Street
Springfield, Illinois 62703
(217) 753-8100

23 pp

QUESTION PRESENTED

Whether a city jailer should be considered a "public official" thereby requiring that he plead and prove actual malice, rather than negligence, to sustain a defamation action.

WILLIAM D. SMITH, Respondent herein, prays that Petitioner's request for a Writ of Certiorari be denied, and that the judgement of the Fourth District Appellate Court of Illinois, entered in the above-named cause on January 31, 1986, be not disturbed.

In addition to the parties identified in the caption, the following additional Defendants have settled with the Plaintiff and are not participating in this appeal: The City of Springfield, Illinois, a municipal corporation, Detective James Dickerson, and Captain Frank Hoover.

TABLE OF CONTENTS

	Page
Table of Authorities	3
Opinions Below	3
Jurisdiction	4
Constitutional Provisions Involved	4
Statement of the Case	5
Reasons for Denying Writ	7
Appendix	
Opinion of the Fourth District Appellate Court of Illinois	A-1
Docket Entry Judgment of the Circuit Court for Sangamon County, Illinois	A-8
Certificate of Service	B-1

TABLE OF AUTHORITIES

Pages

Cases

Coursey v. Greater Niles Township Publishing Corporation, 40 Ill. 2d 257, 239 N.E.2d 837 (1968). 8, 9, 10

Meiners v. Moriarty, 563 F.2d 343, (7th Cir. 1977). 8

New York Times v. Sullivan., 376 U.S 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). 7

Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966). 7, 9

Smith v. Copely Press Inc., 140 Ill. App. 3d 613, 94 Ill. Dec. 785, 488 N.E. 2d 1032 (4th Dist. 1985). 9

OPINIONS BELOW

The opinion of the Fourth District Appellate Court of Illinois is reported at 140 Ill. App. 3d 613,

488 N.E.2d 1032, 94 Ill. Dec. 785, and is printed in the Appendix hereto, page A-1. The judgment of the Circuit Court of Sangamon County, Illinois is contained in the docket entry printed in the Appendix, page A-8.

JURISDICTION

The judgment of the Fourth District Appellate Court of Illinois (Appendix, page A-1) was entered on January 31, 1986. A timely Affidavit of Intention to Appeal was filed on February 20, 1986, and a timely Petition for Leave to Appeal was filed in the Illinois Supreme Court on March 7, 1986. The Illinois Supreme Court denied the Petition for Leave to Appeal on June 3, 1986. The jurisdiction of the Supreme Court of the United States is invoked under the United States Constitution, art. 3, §2, cl. 2, and under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; **or abridging the freedom of speech, or of the press**; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances. (emphasis added).

This case involves Section One of the Fourteenth Amendment to the United States Constitution, which provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States**; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added).

STATEMENT OF THE CASE

On the evening of January 22, 1978, William D. Smith, 25 years old, arrived at the Springfield Police Station, to begin his 8-hour shift as jailer. Although later permanently closed, the jail was then used to incarcerate not only local offenders, but some federal prisoners as well. That evening, the jail was housing two notorious criminals, who had recently been recaptured after having escaped from a federal penitentiary in Missouri.

Smith had a high school degree, and had taken some law enforcement administration courses on the junior college level. Married and the father of two daughters, he had begun working as jailer only 6 months prior to this incident.

Smith had been hired out of an employment agency, and was paid $550 per month to know where the alarms were, book in prisoners, and allow them a phone call. He had access to keys, but did not control them. He had no authority to prohibit a police officer's entry to the cells, and could allow access by any others given clearance by the desk sergeant.

Smith's primary purpose appears to have been to remove shoelaces and belts so inmates could not hang themselves. If there was a fight in a cell, he could not even enter himself, but had to call the desk sergeant. He did not have a weapon, but had access to a nightstick.

That evening, the two prisoners slipped out of their cells, attacked Smith and another jailer, and attempted to escape. They were overpowered and returned to their cells without ever having even made it out of the jail area. The department conducted an immediate investigation, as a result of which Smith was relieved of his duties, treated for his injuries, questioned extensively, and arrested.

The next morning's addition of the State Journal-Register, a newspaper owned and operated by the Petitioner, Copley Press, Inc., detailed the escape attempt in its headline story. The article paraphrased the police chief as having said he "would not be able to say how or why the jailers aided the prisoners until investigations were complete." However, rather than dropping the issue at that point, the article continued:

> According to a police source, Smith was homosexually involved with one or both of the convicts, leading to his alleged involvement in the escape.
>
> The source also said Smith owned a black onyx ring which allegedly was given to one of the prisoners in return for sexual favors. The ring was later found in one of the cells.

A few days later, it was learned that Smith had nothing to do with the jailbreak, but that hacksaw blades had been smuggled into the cellblock by a girlfriend of one of the inmates. The newspaper

never retracted those aspects of its story which applied to Smith, and he never worked at the police station again, after that night.

REASONS FOR DENYING THE WRIT

I

THE TERMS "PUBLIC OFFICIAL" AND "GOVERNMENT EMPLOYEE" ARE NOT SYNONYMOUS. DETERMINING THE DISTINCTION IS THE RESPONSIBILITY OF THE TRIER OF FACT, BASED ON THE UNIQUE CIRCUMSTANCES OF EACH CASE.

In **Rosenblatt v. Baer**, 383 U.S. 75, 86, 86 S.Ct. 669, 676, 15 L.Ed.2d 597 (1966), this Court held:

> The thrust of **New York Times** is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . the **New York Times** malice standards apply.

Applying this standard, Smith cannot be shown to have been one whose qualifications and performance were of greater-than-average interest to the public. He was hired out of an employment agency, and paid a gross salary of $550 per month. There were no training or educational requirements; he had no decision-making responsibilities whatsoever. By holding him to have been a public official, the trial court essentially equated "public

official" with "government employee." If Smith can be held to be a public official, then so can virtually anyone on a public payroll. This was **not** the design of this court.

In **Meiners v. Moriarity**, 563 F.2d 343 (7th Cir. 1977), drug enforcement agents for the Department of Justice were found to have been public officials, to whom the actual malice standard applied. They protested, asserting that to define them as public officials would be to make the term synonymous with "government employee." Although the court disagreed, finding the agents had the power to "directly and personaliy effect individual freedom," the "government employee" assertion was taken to task: The terms should **not** be synonymous. 563 F.2d at 352:

> We need not fear, as the Defendants contend, that holding them to be public officials will make the terms "public official" and "government employee" synonymous. Each case will have to be decided on its own facts, and here the trial court did not err in holding Defendants to be public officials.

With recognition that "public official" and "government employee" are not synonymous comes the task of deciding where the line should be drawn. The definitive guideline for almost 2 decades has been **Coursey v. Greater Niles Township Publishing Corp.**, 40 Ill.2d 257, 239 N.E.2d 837, 841 (1968), where a patrolman was found to have been a public official. He was expressly found to have been "the lowest in rank of police officials." Obviously, the Illinois Supreme Court meant to "draw the line" at the level of patrolman.

Applying **Coursey**, the appellate court refused to lower the line in this instance, agreeing with Smith that "because of the lack of training or education required for the jailer position, the utter lack of authority over other employees or members of the public, and the total lack of discretion accorded him in performing his duties as jailer, he should not be considered a public official." **Smith v. Copley Press, Inc.**, A-6. Applying **Rosenblatt**, Smith's position was found not to have been "of such apparent importance that the public had an independent interest in his qualifications and performance beyond the usual public interest in the qualifications and performance of any government employee." A-7.

The public could not have possibly cared less. Smith was a housekeeper, of so little import that even with his having been rendered helpless by the escaping inmates, they **still** never made it out of the cell area. His title, role and duties were as nebulous as could be. Thus rules the Illinois appellate court in this instance, without dissent.

II

THE ILLINOIS SUPREME COURT ESTABLISHED THE DEFINITIVE GUIDELINES FOR DETERMINING WHO SHOULD BE CONSIDERED A "PUBLIC OFFICIAL." THERE IS NO NEED TO ALTER THE FORMULA IN THIS INSTANCE.

Petitioner's alleged conflict of decisions is insignificant, where definitive, universal guidelines have been established for determining who is a "public official." There is no need to alter the formula in this instance.

In **Coursey v. Greater Niles Township Publishing Corp.**, 40 Ill.2d 257, 239 N.E.2d 837, 841 (1968), the Illinois Surpreme Court established an instructive rather than dictatorial approach to determining what professions fall in the "public official" category. This has been the key to its timeless applicability.

Coursey, as well as hundreds of decisions which have followed its lead, comprise a grand network of rulings which could never have survived so long were **Coursey** to have been overly restrictive. Courts throughout the nation have followed its lead, applying its parameters to the unique circumstances of each given case. The abundance of case law belies Petitioner's assertion that a chilling affect will result, if its petition for certiorari is denied. Indeed, it has not even taught Petitioner to tread carefully where it has the power to humiliate.

In this instance, Smith was a mere turnkey, obviously without the power to have affected a successful jailbreak, even if he wanted to do so. His role did not affect the life, liberty, money or property of anyone, and he had no power to enhance or disrupt anyone's enjoyment of life, peace or tranquility. He was so low in the hierarchy of government employees he had no responsibility whatsoever for, or control over, police affairs. He was as close to a non-entity as a person could be.

Petitioner argues a jailer is a public official because his job is important, and there is a strong public interest in maintaining a city jail's security. The public has an interest in the free flow of sewage as well; but Petitioner has yet to cite a case in which a street department employee is considered a public official. A distinction must be made, for First Amendment purposes, between

low-ranking governmental employees performing ministerial functions to support their families, and high-ranking officials who perform discretionary acts in furtherance of the affairs of government, or who have substantial responsibility for, or control over, the conduct of such affairs.

The Illinois Appellate Court has made this distinction. Respondent respectfully submits it should be acceptable to this Court, and be allowed to stand.

CONCLUSION

In conclusion, the Illinois appellate court properly refused to extend the parameters of **Coursey** to apply to a lowly turnkey, hired out of an employment agency to work the nightshift, whose most important job duty appears to have been not to get caught napping. Not by any stretch of the imagination should he be considered a public official. **Coursey** has proven to be flexible and instructive. Imposition of restrictions upon this standard could cause more harm by failing than benefit by succeeding.

Respectfully submitted,

STURM & LEVENS, Attorneys for
Plaintiff, William D. Smith,

Jeffrey B. Levens

STURM & LEVENS
Attorneys at Law
308 East Canedy Street
Springfield, IL 62703
217/753-8100

APPENDIX

NO. 4—85—0388

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

WILLIAM D. SMITH, Plaintiff-Appellant, v. COPLEY PRESS, INC., an Illinois Corporation, THE STATE JOURNAL-REGISTER, JIM TINEN, STEVE SLACK, JOHN P. CLARK, EDWARD H. ARMSTRONG, PATRICK COBURN, Defendants-Appellees, and THE CITY OF SPRINGFIELD, a municipal corporation, DETECTIVE JAMES DICKERSON, and CAPTAIN FRANK HOOVER, Defendants.	) Appeal from) Circuit Court) County of Sangamon) No. 4079)))))))) Honorable) R. J. Cadagin, and) J. S. Rhodes,) Judges Presiding.)))))

JUSTICE MORTHLAND delivered the opinion of the court:

The plaintiff appeals from entry of summary judgment for the defendants in a defamation action. We reverse.

The plaintiff, William D. Smith, worked as a jailer or "turnkey" at the Springfield police station. This facility was used to incarcerate both local offenders and Federal prisoners. When the

incidents giving rise to this litigation occurred, the plaintiff had been working as a jailer for approximately five months. As a jailer, the plaintiff was a civilian employee of the Springfield police department. Although he had a high school degree and had taken some courses in law enforcement administration at a junior college, there were no educational or training prerequisites to the jailer position. The plaintiff had access to keys which unlocked the cell doors and others within the jail facility. He carried no weapon, although he had access to a nightstick. The manual which details the jailer's duties indicates that the plaintiff had no authority to allow a person other than a police officer into the jail without prior authorization by a superior. The plaintiff was required to conduct periodic body counts of the prisoners, inventory and store valuables found on prisoners, and ensure that prisoners had been properly searched by the police officer who booked them. The jailer was also required to know where alarms were located within the jail and was to see that proper booking procedures were followed.

On the night of January 22-23, 1978, while the plaintiff was on duty, two Federal prisoners attempted to escape. The prisoners sawed through bars on one door within the jail and appeared in a front room where the plaintiff and another jailer were on duty. The plaintiff and his fellow jailer grappled with the escaping prisoners and within a short time, police arrived and returned the prisoners to their cells.

The January 23, 1978, morning edition of the State Journal-Register, a newspaper owned and operated by defendant Copley Press, Inc., contained a front-page story detailing the escape

attempt. The article reported that the plaintiff and his fellow jailer were treated for injuries and that the plaintiff and a third jailer, Karl E. Kaylor, had been arrested on charges of aiding the escape attempt. The article paraphrased the Springfield Police chief as stating that he "would not be able to say how or why the jailers aided the prisoners until investigations were complete." The article then continued:

> "According to a police source, Smith was homosexually involved with one or both of the convicts, leading to his alleged involvement in the escape.
>
> The source also said Smith owned a black onyx ring, which allegedly was given to one of the prisoners in return for sexual favors. The ring was later found in one of the cells."

Subsequently, officials apparently determined that the escaping prisoners had used materials smuggled into their cells by a girlfriend of one of the escapers during Mr. Kaylor's shift at the jail. A grand jury refused to indict the plaintiff for his alleged involvement in the escape attempt. Nevertheless, the plaintiff did not return to work with the police department after January 23, 1978.

On January 22, 1979, the plaintiff filed suit in Sangamon County circuit court alleging that the paragraphs from the article, quoted above, had libeled him. Included as defendants were the State Journal-Register's parent company, Copley Press, the newspaper's reporters and editors, the city of Springfield, and two Springfield policemen, detective James Dickerson and captain Frank Hoover. Only the newspaper defendants remain at this juncture.

Counts I and III pertain to the newspaper defendants. Count I alleged that the newspaper defendants knew or should have known that the article's statements concerning the plaintiff's alleged homosexual activity were false and that these defendants did not believe in the truth of the assertedly libelous statements. Count III alleged that the newspaper defendants either failed to exercise reasonable care in determining the truth of their statements concerning the plaintiff or lacked reasonable grounds for their belief that these statements were true. Under count I, the plaintiff also alleged that the article was published with reckless disregard of the truth.

The unnamed police source referred to in the allegedly libelous statements was identified in depositions as captain Frank Hoover, the highest ranking police official on duty during the escape. On February 26, 1985, the newspaper defendants filed a motion for summary judgment. In their motion the defendants argued that the plaintiff was a "public official" within the meaning of the **New York Times** rule. (**New York Times Co. v. Sullivan** (1964), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710.) They further claimed that since the source of the allegedly defamatory material in the article was a high ranking police official who believed his statements concerning the plaintiff to be true, and since the reporter relied on his source in good faith, no issue of fact concerning the existence of the "actual malice" required by **New York Times** existed.

On May 8, 1985, the circuit court granted the motion for summary judgment against the plaintiff.

The plaintiff appeals, contending that if he is deemed a "public official," his count I and the record sufficiently present a factual issue as to

whether the newspaper defendants acted with "actual malice." The plaintiff also seeks to reverse the trial court's determination that count III, the claim under a negligence theory, was inadequate due to the plaintiff's "public official" status.

In 1964, the United States Supreme Court limited the scope of defamation laws to bring them in line with the goals of the free speech clause of the first amendment. The high court determined that:

> "The Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." **New York Times Co. v. Sullivan** (1964), 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 726.

The Supreme Court subsequently extended this "actual malice" standard to "public figures" as well as public officials. **(Curtis Publishing Co. v. Butts** (1967), 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975.) None of the parties in the instant case contend that the plaintiff is a "public figure." Indeed, the defendants' motion for summary judgment was premised upon the plaintiff being a public official.

The United States Supreme Court further defined the term "public official" in **Rosenblatt v. Baer** (1966), 383 U.S. 75, 15 L. Ed. 2d 597, 86 S. Ct. 669. The **Rosenblatt** Court determined that "'the public official' designation applies at the very least

to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." (383 U.S. 75, 85, 15 L. Ed. 2d 597, 605, 86 S. Ct. 669, 676). Nevertheless, the Supreme Court cautioned that the "public official" characterization, with the attendant application of the **New York Times** malice standards, should be reserved for those positions in government in which "the public has [an] independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees ***." 383 U.S. 75, 86, 15 L. Ed. 2d 597, 606, 86 S. Ct. 669, 676.

The defendants argue that the plaintiff, as a jailer, is indistinguishable from a police officer. Police officers, of whatever rank, are unquestionably "public officials" in Illinois. **(Coursey v. Greater Niles Township Publishing Corp.** (1968), 40 Ill. 2d 257, 239 N.E.2d 837.) The plaintiff counters that because of the lack of training or education required for the jailer position, the utter lack of authority over other employees or members of the public, and the total lack of discretion accorded him in performing his duties as jailer, he should not be considered a public official.

In our view, the plaintiff performed different duties and possessed significantly less authority than does a police officer, of whatever rank. His status as a "public official" is, therefore, not controlled by the **Coursey** case. The appellate court's statement concerning a public school principal in **McCutcheon v. Moran** (1981), 99 Ill. App. 3d 421, 425 N.E.2d 1130, is equally applicable to the plaintiff in this case. In **McCutcheon**, the appellate court noted

that, "[i]mplicit in the reasoning of **New York Times Co. v. Sullivan** is the concept of a freedom of the governed to question the governor, of those who are influenced by the operation of government to criticize those who control the conduct of government." (99 Ill. App. 3d 421, 424, 425 N.E.2d 1130, 1133.) The **McCutcheon** court termed the relationship a public school principal has to the conduct of government "too remote" to open such an individual to a qualifiedly privileged assault on their reputation. Likewise, the plaintiff here had no authority to control the workings of his government employer. Even conceding that abuse of the jailer position may affect the public interest, we cannot say that the plaintiff held a position of such apparent importance that the public had an independent interest in his qualifications and performance beyond the usual public interest in the qualifications and performance of any government employee.

We hold that the plaintiff was not a "public official" during the events which led to this lawsuit for purposes of the **New York Times** malice standards. Accordingly, we reverse the judgment of the circuit court and remand for further proceedings consistent with this opinion.

Reversed and remanded.

WEBBER and SPITZ, JJ., concur.

WILLIAM SMITH

vs.

THE STATE JOURNAL REGISTER, ET AL.

40-79 (SMITH VS. STATE-JOURNAL REGISTER, ET AL.)
RJC/djc
3/31/83 DE
Defendant's Motion for Summary Judgment allowed.
Cause dismissed. Cause stricken.

CERTIFICATE OF SERVICE

The undersigned, Jeffrey B. Levens, Counsel for Respondent, WILLIAM D. SMITH, hereby certifies that pursuant to Supreme Court Rule 28.3 he has served three (3) copies of the foregoing Petition for Writ of Certiorari upon:

BARRY O. HINES
Barber, Segatto, Hoffee, Hines & Edwards
P.O. Box 79
Springfield, IL 62705

_____

Jeffrey B. Levens